IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL REVISION APPLICATION NO. 11 OF 2003.

Dr. M.N. Pal,
Ex-Dean, Goa Medical
College, Bambolim. ... Applicant.

Versus

1. State of Goa through
   Chief Secretary,
   Secretariat, Panaji.
2. The Public Prosecutor,
   Directorate of Prosecution,
   Panaji.
3. Assistant Public Prosecutor,
   Directorate of Prosecution,
   Panaji.
4. Dr. Vijay R. Talaulikar,
   r/o Talaulikar Nursing Home,
   St. Cruz. Goa.
5. Dr. (Mrs.) Veena P. Velingkar,
   r/o Talaulikar Hospital Nursing
   Home, St. Cruz, Goa. ... Respondents.

Mr. J. Godinho, Advocate for the Applicant.

Mr. S.N. Sardessai, Public Prosecutor for the
Respondents 1 to 3.

Mr. D. Muktekar, Advocate for the Respondents 4 and 5.

Coram : P.V. HARDAS, J.

Date : 24th July 2003.

ORAL JUDGMENT.

This Criminal Revision Application has been filed by the applicant, challenging the Order, dated 13th October 2001, passed by the Judicial Magistrate, First Class, Panaji, in Criminal Case No. 42/2001/C, granting permission for withdrawal of the prosecution against respondents 4 and 5.

2. It is not necessary to refer to the facts of

the prosecution case, in view of the limited challenge raised in the present revision. It appears that the Government took a decision for withdrawal of the prosecution, that is, withdrawal of Criminal Case No. 40/2000, under Section 304-A read with Section 34 of the Indian Penal Code on the ground that the case was of a highly technical nature and prima facie it appeared to the Government that there was paucity of evidence for establishing the charge in the case. The third reason was that the husband of the deceased had desired that the case may be closed. This decision of the Government was communicated by a letter, dated 16th July 2001 to the Director of Prosecution, Panaji, Goa. The Director of Prosecution, by his letter, dated 23rd July 2001, intimated the Assistant Public Prosecutor of the decision of the Government and requested the Assistant Public Prosecutor to take necessary steps for withdrawal of the said case. Accordingly the Assistant Public Prosecutor filed an application, dated 20th August 2001, at Exhibit M-7. The application reads as under:-

> " On behalf of the prosecution it is prayed as under:-
>
> 1. That the Director of Prosecution vide letter No. 1-19-2001-DP-WDL dated 23.7.2001, have directed the undersigned to withdraw from prosecution in the above case. Hereto annexed is the Xerox Copy of the said letter.
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> 2. That the Under Secretary (Home) vide letter No. 2/57/2001-HD(6) dated 16.7.2001, has directed the Director of Prosecution to

withdraw from prosecution. Hereto annexed is the Xerox Copy of the said letter.

Hence it is prayed that the necessary order may please be passed.

Panaji, Goa. Sd/-.
Dated:-20/8/2001 Asst. Public Prosecutor."

3. The learned Magistrate, by the Order impugned in the present revision, allowed the said application on the ground that the learned Magistrate had heard the complainant in person, the Collector and District Magistrate of South Goa, Margao, and C.W.3 Mariano Duarte. The learned Magistrate then proceeded to allow the application on the ground that the complainant had no grievance if the case was withdrawn by the prosecution and taking into considerations the submissions of the learned Assistant Public Prosecutor, the learned Magistrate concluded by observing "that no public interest is involved in this case and as such this is fit case to withdraw thereby discharging the accused persons and cancelling bonds and the surety bonds." It is this Order, which is impugned in the present matter before me.

4. Mr. Godinho, the learned counsel appearing on behalf of the applicant, has urged before me that the learned Assistant Public Prosecutor has mechanically filed an application for withdrawal of the prosecution without being satisfied about the genuineness of the reasons stated. According to the learned counsel for

the applicant, a perusal of the application at Exhibit M-7 does not disclose that the learned Assistant Public Prosecutor had applied her mind. The learned counsel for the applicant has further urged before me that the trial Court has mechanically permitted the withdrawal of the application, which is wholly in breach of Section 321 of the Code of Criminal Procedure.

5. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the respondents 1 to 3, has urged before me that though the application at Exhibit M-7 does not reflect that the Assistant Public Prosecutor has applied her mind, still it can be discerned that there is an application of mind and that the Assistant Public Prosecutor has not mechanically filed the application.

6. Mr. Muktekar, the learned counsel appearing on behalf of the respondents 4 and 5/original accused, has urged before me (1) that the Order was passed in the year 2001 and in case this revision is allowed, then it would be an exercise in futility as the prosecution will still be able to file a proper application; (2) he has also urged before me that the complainant, who is primarily the aggrieved party, has no objection for withdrawal of the prosecution; (3) mere non-mentioning in the Exhibit M-7 by the learned Assistant Public

Prosecutor of her being satisfied, would only be an irregularity and as such this Court should not interfere in revision and (4) the respondents are renowned doctors, who are being prosecuted for an offence under Section 304-A of the Indian Penal Code and would now have to face the rigours of a trial.

7. The Apex Court in the Judgment of **Rajender Kumar Jain v. State through Spl. Police Establishment and others**, A.I.R. 1980 S.C. 1510 has held that it is the duty of the Public Prosecutor to inform the Court and it shall be the duty of the Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its "Minister of Justice". Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 321 of the Criminal Procedure Code. The Apex Court then further observed that the Courts when moved for permission for withdrawal from prosecution must be vigilant and inform themselves fully before granting consent.

8. The Apex Court in **V.S. Achuthanandan v. R. Balakrishna Pillai and others**, A.I.R. 1995 S.C. 436

has held that where an application for withdrawal of prosecution was filed by Public Prosecutor under Section 321 of Criminal Procedure Code, the Court should not consider grounds which were not urged by the Public Prosecutor or which did not form part of the record because for the purpose of Section 321 it is the opinion of the Public Prosecutor alone which is material and the ground on which he seeks permission of the Court for withdrawal of the prosecution has alone to be examined, by Court while granting permission for withdrawal of prosecution.

9. The Apex Court in **R.M. Tewari v. State (NCT of Delhi) and others**, A.I.R. 1996 S.C. 2047 has held that withdrawal from prosecution is not to be permitted mechanically by the Court on an application for that purpose made by the Public Prosecutor. It is equally clear that the Public Prosecutor also should not act mechanically in the discharge of his statutory function under Section 321 of the Criminal Procedure Code. It is the duty of the Public Prosecutor to satisfy himself that it was a fit case for withdrawal from prosecution before he seeks the consent of the Court for that purpose. The Supreme Court, therefore, struck down the Order of withdrawal of prosecution as the Public Prosecutor had filed an application for withdrawal only on the basis of the recommendation of the Review

Committee.

10. In a recent Judgment of the Apex Court in **Abdul Karim etc. etc. v. State of Karnataka and others etc. etc.**, A.I.R. 2001 S.C. 116 has held:-

> " The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the Court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.
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> It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the Court, with its permission, in a sealed envelope. The Court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the Court

> to weigh the material. The Court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The Court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the Court accords consent, it must make such order on the application as will indicate to a higher Court that it has done all that the law requires it to do before granting consent."

11. The Apex Court in **She Nandan Paswan v. State of Bihar and others**, A.I.R. 1987 S.C. 877 has held:-

> " When the application for consent to the withdrawal from the prosecution comes for consideration, the Court has to decide whether to grant such consent or not. The function which the Court exercises in arriving at this decision, as pointed out by this Court in State of Bihar v. Ram Naresh, (AIR 1957 SC 389), is a judicial function. The Court has to exercise its judicial discretion with reference to such material as is then available to it and in exercise of this discretion the Court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised and that the grounds urged in support of the application for withdrawal are legitimate grounds in furtherance of public justice. The discretion has not to be exercised by the Court mechanically and the consent applied for has not to be granted as a matter of formality or for the mere asking. The Court has to consider the material placed before it and satisfy itself that the grant of consent would serve the interest of justice."

12. Mr. Muktekar, the learned counsel appearing on behalf of respondents 4 and 5, has placed reliance on

the Judgment of **Sheonandan Paswan v. State of Bihar and others,** A.I.R. 1983 S.C. 194. The Apex Court in this case has held that Section 321 enables the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw from the prosecution with the consent of the Court. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. But it cannot be said that a Public Prosecutor's action will be illegal if he receives any communication or instruction from the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is an appointee of the Government, Central or State appointed for conducting in Court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Section 321 does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that Section. If the Public Prosecutor receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the

Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government. The Supreme Court has further held that the perusal of the application made by the Public Prosecutor abundantly shows that he did apply his mind to the facts of the case.

13. The facts of the aforesaid authority, in my respectful opinion, are of no assistance to the respondents 4 and 5. The application filed by the learned Assistant Public Prosecutor, which is at Exhibit M-7, clearly demonstrates that the learned Assistant Public Prosecutor had not applied her mind to the facts of the case. The learned Assistant Public Prosecutor had mechanically filed that application because of the instructions she had received. The application on the face of it should disclose that the Assistant Public Prosecutor had applied her mind and the Order impugned in the revision also does not reflect the application of mind by the learned trial Court to the reasons advanced by the prosecution for withdrawal. For reasons which were not germane, the learned trial Court has allowed the withdrawal. The Order on the face of it is unsustainable and, therefore, deserves to be quashed and set aside. Accordingly Criminal Revision Application is allowed. The Order impugned in this revision is hereby quashed and set aside. Record and Proceeding is

remitted to the learned trial Court.

(P.V. HARDAS)
JUDGE.

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